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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 803

IN THE MATTER

of

SIDNEY SARNER,
Charged With Criminal Contempt,

Appellant.

ON APPEAL FROM FINAL JUDGMENT OF
THE SUPREME COURT OF NEW JERSEY

PETITION FOR REHEARING OF ORDER GRANTING MOTION TO DISMISS APPEAL AND DISMISSING APPEAL

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PETITION FOR REHEARING OF ORDER GRANTING MOTION TO DISMISS APPEAL AND DISMISSING APPEAL

Appellant prays that this Court grant rehearing of its order of May 25, 1959, which granted the motion of the Attorney General of New Jersey to dismiss the appeal, and dismissed the appeal.

Reasons for Granting Rehearing and Entertaining the Appeal

1. This Court's order of May 25, 1959 being silent as to the reason for the dismissal of the appeal, appellant is venturing to submit this petition for rehearing on the *assumption* that there may possibly be some significance

(potentially favorable to the appellant) in the Court's having refrained from expressly declaring either that the appeal lacks a substantial federal question, or that the appeal lacks a properly presented federal question. In other words, by reason of the noncommital form of the order of May 25, 1959, it may be appropriate for appellant to attempt a concise re-presentation of the principal federal questions involved and, more especially, of the way in which those questions arise. As appellant reads Rule 58 of the Rules of this Court, a petition for rehearing of an order dismissing an appeal is governed by paragraph 1, rather than by paragraph 2, of Rule 58, so that the present petition for rehearing would not seem to be subject to the requirements of Rule 58(2) as to "intervening circumstances" etc. in cases of certiorari jurisdiction.

2. Appellant realizes—and he so indicated in the Jurisdictional Statement, pp. 4, 20-25—that he cannot expect this Court to entertain his Fourteenth Amendment jury trial contention in this case of criminal contempt unless the Court is disposed to examine *de novo* two propositions of constitutional law which have long been assumed to be settled. Those two propositions are: (1) that the Fourteenth Amendment does not require jury trial in state prosecutions for crime; and (2) that the Fourteenth Amendment does not require jury trial in state prosecutions for criminal contempt. As to the first of the above two propositions, we showed in our Jurisdictional Statement (pp. 23-24) that while numerous decisions of this Court contain declarations that the Fourteenth Amendment does not guarantee the right of jury trial in state prosecutions for crime, *there appears to be no decision of this Court which actually so holds in a factual situation where the right of jury trial was denied in toto (as happened in this case).* We showed (*ibid.*) that *all* of the decisions of this Court containing declarations of the kind just mentioned either

were civil cases or were criminal cases involving factual situations short of actual denial of jury trial *in toto*. As to the second proposition above stated, we showed in our Jurisdictional Statement (pp. 20-21) that the case which originally held (nearly seventy years ago) that the Fourteenth Amendment does not require jury trial in state prosecutions for criminal contempt—*Eilenbecker* v. *District Court*, 134 U. S. 31—has only once since then been cited by this Court in a state case of criminal contempt where jury trial was actually demanded and denied; and in that one case (*Fisher* v. *Pace*, 336 U. S. 155, 159n.), the facts involved (1) an attorney (not a layman, as here), (2) who was accused of defiant acts *in facie curiae* (as distinct from the facts here, where appellant spoke allegedly abusive words but did not engage in defiant or obstructive acts), and (3) who was convicted *instanter* (as distinct from the situation in our case where the trial and conviction occurred more than three months after the allegedly contemptuous words were spoken and after the court proceedings involved had been undisturbedly concluded). We also suggested in our Jurisdictional Statement (pp. 20-21) that the exhaustive scholarship devoted by the Court to the contempt-jury trial question in *Green* v. *United States*, 356 U. S. 156, dealing as it did in that case with the *federal* power, did not necessarily dispose of the jury trial question in *state* contempt cases. It is true that the historical-legal materials relating to the no-jury rule in criminal contempt cases are not wholly identical with the materials relating to the Fourteenth Amendment jury trial question in state *criminal* cases as such. That is, theoretically this Court might reaffirm the *Eilenbecker* rule (no Fourteenth Amendment requirement of jury trial in state criminal contempt cases), even if it were to re-examine the no-jury rule in state criminal prosecutions as such and were to abrogate the later rule. But is it likely that *Eilenbecker*

could stand if it were to be held that the Fourteenth Amendment requires jury trial in state criminal prosecutions? It is in the light of this last-stated hypothetical question of constitutional law, that we urge this Court to reconsider our demonstration (Jurisdictional Statement, pp. 23-24) of the rather remarkable fact that this Court has never actually *held* that the Fourteenth Amendment does not require a jury trial in a state criminal prosecution where jury trial was actually denied *in toto*.

3. Within the space limitations of the Jurisdictional Statement we were unable to set forth *in extenso* the portions of the record and briefs below which show how the federal questions are presented, although we did cite all of the pertinent references to the record and to those briefs (Jurisdictional Statement, pp. 13-18). Also, we did not call attention in our Jurisdictional Statement to the decisions of this Court to the effect that when the highest state court considers and decides federal questions this Court may take the case on the assumption that the federal issues were properly raised. E.g., *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U. S. 182, 185-186; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 267-268; *Whitney* v. *California*, 274 U. S. 357, 360-361. As shown in our Jurisdictional Statement (pp. 15-17, 18), the Supreme Court of New Jersey (whose *per curiam* opinion consisted of a *verbatim* adoption of the opinion of the Appellate Division) expressly considered and rejected appellant's federal constitutional contentions as to jury trial (Jurisdictional Statement, Appendix A, pp. 6a to 7a), and free speech (id., p. 6a). On the jury trial point the Court expressly cited New Jersey's R.R. 3:8-3 as permitting discretionary denial (id., p. 7a, line 11).

4. In this petition for rehearing we refrain from presenting additional argument on the due process issues of adequate notice and hearing (Jurisdictional Statement, pp.

3-5, 19, 25-26), because we are proceeding under the provisions of Rule 58(1), and these last mentioned issues might not be thought to arise so plainly within the appellate jurisdiction of this Court as is true of the jury trial issue. We do, however, respectfully adhere to our position that the extreme summariness of the procedure used in trying and convicting the appellant was generated by, or consisted of applying to the appellant, the provisions of New Jersey's R.R. 3:8—so that a proper issue on appeal is presented in this respect.

CONCLUSION

For the reasons set forth above and in the Jurisdictional Statement and the Reply Brief for appellant, it is respectfully urged that rehearing be granted and that, upon such rehearing, this Court should entertain the appeal to consider our contentions that the decision below has construed and applied New Jersey's R.R. 3:8 so as to deny to the appellant his rights of jury trial, freedom of speech, and adequate notice and hearing in violation of the Fourteenth Amendment. Appellant further respectfully prays that, if such should be deemed by the Court appropriate within the framework of a rehearing governed by Rule 58(1), and if this matter should still be deemed to present no proper case for appeal, the Court may grant rehearing for the purpose of treating the papers as a petition for a writ of certiorari and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of New Jersey.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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Counsel for Appellant.